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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
AT SPOKANE

SARAH BRADBURN, PEARL )  
CHERRINGTON, CHARLES )  
HEINLEN, and THE SECOND ) NO. CV-06-327-EFS  
AMENDMENT FOUNDATION, )  
Plaintiffs, ) DEFENDANT NCRL'S  
v. ) MEMORANDUM REGARDING  
Defendant. ) RESPONSE TO CERTIFIED  
QUESTION )  
NORTH CENTRAL REGIONAL )  
LIBRARY DISTRICT, )  
Defendant. )  
----- )

The analysis of the Washington Supreme Court in *Bradburn, et al. v.*

*North Central Reg. Lib. Dist.*, 168 Wn.2d 789, 231 P.3d 166 (2010)

DEFENDANT NCRL'S MEMORANDUM  
REGARDING RESPONSE TO CERTIFIED

QUESTION - 1

CV-06-327-EFS

#758984 v1 / 42703-001

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1 (“*Bradburn*”) answers all legal issues held in abeyance by this Court’s  
 2 September 30, 2008 order. (Dkt. 96). Neither Defendant North Central  
 3 Regional Library District (“NCRL”) nor Plaintiffs<sup>1</sup> contend that genuine issues  
 4 of material fact remain unresolved. Accordingly, this Court should decide the  
 5 pending cross-motions for summary judgment at this time based on *Bradburn*  
 6 and the parties’ previous submissions.

7

8 **I. *Bradburn* resolves Plaintiffs’ Article I, Section 5 claim.**

9

10 On May 6, 2010, the Washington State Supreme Court answered this  
 11 Court’s certified question, holding that:

12

13 a library can, subject to the limitations set forth in this opinion,  
 14 filter Internet access for all patrons, including adults, without  
 15 violating article I, section 5 of the Washington State Constitution.

16 *Bradburn*, 168 Wn.2d at 793.

17

18 The *Bradburn* court stated that it would conclude NCRL’s filtering policy  
 19 does not violate article I, section 5, on the record presented but recognized this  
 20 Court must apply the decision to the case. *See Bradburn*, 168 Wn.2d at 818.  
 21 Because *Bradburn* unequivocally held that NCRL’s filtering policy was  
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26 <sup>1</sup> *See, e.g.*, Plaintiffs’ Opposition to NCRL’s Motion for Summary Judgment (Dkt. 53,  
 27 pg. 1, lns. 2-3): “The facts crucial to resolving this case are not in dispute.....”

28 DEFENDANT NCRL’S MEMORANDUM  
 REGARDING RESPONSE TO CERTIFIED

QUESTION - 2

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1 consistent with article I, section 5 of the Washington State Constitution,  
 2 summary judgment should be entered for NCRL on this claim.<sup>2</sup>  
 3

4 **II. Plaintiff's First Amendment claim is foreclosed by ALA  
 5 as explained in Bradburn**

6 Although *Bradburn* literally deals with Plaintiffs' state constitutional  
 7 claim, the court drew heavily upon First Amendment law in evaluating  
 8 Plaintiffs' challenges to NCRL's filtering policy. Thus, the *Bradburn* Court's  
 9 analysis is highly instructive in resolving Plaintiffs' federal claim.

10 The First Amendment claim is based on two contentions: first, that  
 11 NCRL's filtering policy is overbroad;<sup>3</sup> and second, that NCRL's filtering policy  
 12 is a constitutionally impermissible content-based restriction on speech. Both  
 13 arguments fail in light of *United States v. American Library Ass'n*, 539 U.S.  
 14 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003) ("ALA") and other federal  
 15 precedent as explained in *Bradburn*.

20  
 21  
 22 <sup>2</sup> In dealing with questions of state law, federal courts are bound by the decisions of  
 23 the state's highest court. *See LaFrance Corp. v. Werttemberger*, 2008 LEXIS 98741 at \*4  
 24 (W.D. Wash. 2008) citing *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1154 (9th Cir.  
 2003).

25 <sup>3</sup> Plaintiffs claim overbreadth in "categorizations that fail to track constitutional  
 26 requirements, filtering errors, and NCRL's policy of blocking entire web sites when a single  
 27 page is deemed harmful to minors." *Bradburn*, 168 Wn.2d at 804.

28 DEFENDANT NCRL'S MEMORANDUM  
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1 A. NCRL's filtering policy is not overbroad.

2 In evaluating Plaintiffs' overbreadth arguments for, the *Bradburn* court  
3 followed First Amendment methodology:

4 Accordingly, in deciding whether the filtering policy suffers from  
5 overbreadth under article I, section 5, our analytical approach aligns  
6 with the approach taken under the First Amendment.  
7

8 *Bradburn*, 168 Wn.2d at 801. In doing so, the *Bradburn* court noted that a  
9 majority (not a plurality) of the U.S. Supreme Court reached agreement in *ALA*  
10 on several key points, including:

12 • “public forum analysis is inappropriate in determining whether a library  
13 can constitutionally filter certain Internet content.” *Bradburn*, 168 Wn.2d at  
14 804;

16 • “strict scrutiny does not apply [to a library’s collection decisions].” *Id.*  
17 at 805; and

19 • libraries must exercise discretion when building and maintaining a  
20 collection and filtering policies aid in the collection of materials, not the removal  
21 of materials after having been selected. *Id. (emphasis supplied).*  
22

23 Based on these and other rulings from *ALA*, the *Bradburn* court concluded  
24 that “a library simply does not have to include all constitutionally protected  
25

28 DEFENDANT NCRL'S MEMORANDUM  
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QUESTION - 4

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1 materials in its collection" and that a filtering policy that denies access to  
 2 particular categories of material is not necessarily overbroad. *Bradburn*, 168  
 3 Wn.2d at 808. Nothing in *ALA* or other federal First Amendment law warrants a  
 4 different analysis and conclusion than that reached by the *Bradburn* court.  
 5

6 **B. NCRL's filtering policy is not an impermissible content restriction under**  
**the First Amendment.**

7 The *Bradburn* court also drew upon federal First Amendment principles in  
 8 rejecting the contention that NCRL's filtering policy is an unconstitutional  
 9 content-based restriction on speech. The *Bradburn* court began its analysis of  
 10 this issue by rejecting Plaintiffs' assertion that content-based restrictions are  
 11 presumptively invalid and subject to strict scrutiny. *Bradburn*, 168 Wn.2d at  
 12 812 citing *National End. for Arts v. Finley*, 524 U.S. 569, 585, 118 S. Ct. 2168,  
 13 141 L. Ed. 2d 500 (1998)(“content-based considerations that may be taken into  
 14 account in the grant-making process are a consequence of the nature of arts  
 15 funding”) and *Arkansas Educ. Tele. Comm. v. Forbes*, 523 U.S. 666, 672-73,  
 16 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998). Instead, the *Bradburn* court agreed  
 17 with *ALA* that Internet access in a public library is not subject to public forum  
 18 analysis or heightened scrutiny. In light of the historical civic role of the public  
 19 library, and the discretion a library must have to make judgments about the  
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 28 DEFENDANT NCRL'S MEMORANDUM  
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QUESTION - 5

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1 makeup of its collection, the *Bradburn* court held that a filtering policy is  
 2 constitutionally-permissible if it is reasonable in light of the library's mission  
 3 and policies and is viewpoint neutral. *See Bradburn*, 168 Wn.2d at 811.

5 The *Bradburn* court determined that NCRL's filtering policy met that  
 6 standard, noting that:

- 8 • NCRL's essential mission is to promote reading and lifelong learning.

9 Thus, it is reasonable to restrict Internet access to maintain an environment  
 10 conducive to study and contemplative thought;

12 • NCRL serves as the *de facto* school library in more than half of its  
 13 branches. Unfiltered Internet access is not well-suited to the education of  
 14 children and may adversely affect other patrons and library staff as well;

16 • NCRL patrons have practical alternatives when content is blocked; and  
 17 • NCRL's filtering policy draws no distinctions based on the speaker's  
 18 viewpoint. *Bradburn*, 168 Wn.2d at 816-17.

21 The *Bradburn* court correctly applied *ALA* and other First Amendment  
 22 principles in evaluating Plaintiffs' state constitutional claim. The operative facts  
 23 surrounding Plaintiffs' First Amendment claim, and the rational basis test  
 24 against which the facts are judged, are no different. Plaintiffs may advocate for  
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 28 DEFENDANT NCRL'S MEMORANDUM  
 REGARDING RESPONSE TO CERTIFIED

QUESTION - 6

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1 heightened scrutiny but federal law does not support them. Indeed, in *Ass'n. of*  
 2 *Christian Schools v. Stearns*, No. 08-56320, 2010 U.S. App. LEXIS 745, at \*3  
 3 (9th Cir. Jan. 12, 2010),<sup>4</sup> the Ninth Circuit recently cited *ALA*, *Finley*, and  
 4 *Forbes* (as did the *Bradburn* court) in recognizing that content-based restrictions  
 5 on speech are subject only to rational basis scrutiny when the government is  
 6 performing a function requiring subjective judgment. The Court wrote:  
 7

8       The Supreme Court has rejected heightened scrutiny where, as here,  
 9 the government provides a public service that, by its nature,  
 10 requires evaluations of and distinctions based on the content of  
 11 speech.  
 12

13       Similarly, a Texas district court recently relied upon *ALA* and *Finley* for  
 14 the same principle: when a public service requires the drawing of content-based  
 15 distinctions, the decisions that are made are subject to rational basis review.  
 16  
 17 *Institute for Creation for Research Graduate School v. Texas Higher Educ.*  
 18  
 19 *Coordinating Bd.*, No. A-09-CA-382-SS, 2010 U.S. Dist. LEXIS 60699, at \*46-  
 20 47 (W.D. Tex. June 18, 2010).  
 21

22       As these decisions demonstrate, *Bradburn*'s application of a rational basis  
 23 review to NCRL's filtering policy follows from a correct interpretation of *ALA*  
 24

25       <sup>4</sup> In *Stearns*, the court affirmed a district court's determination that the University of  
 26 California's admission policy met First Amendment and Equal Protection standards on its  
 27 face and as applied.  
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DEFENDANT NCRL'S MEMORANDUM  
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1 and First Amendment principles. Plaintiffs nevertheless urge this Court to strike  
 2 down NCRL's filtering policy because of their view that *ALA* requires filtering  
 3 to stop when an adult patron requests it. *ALA* does not stand for this proposition.  
 4 Instead, *ALA* supports libraries' use of filtering in making collection decisions as  
 5 long as a mechanism exists for adult patrons to seek the unblocking of  
 6 erroneously blocked content consistent with the library's legitimate collection  
 7 development policies. 539 U.S. at 214-19. NCRL has precisely such a  
 8 mechanism in place. *See Bradburn*, 168 Wn.2d at 798. Nothing in *ALA*  
 9 empowers an adult patron to override the reasonable decisions of a library about  
 10 the access to internet content. Indeed, in his concurring opinion Justice Breyer  
 11 specifically noted that libraries might, by local law or practice, restrict the ability  
 12 of patrons to obtain overblocked internet material. 539 U.S. at 219-220.<sup>5</sup>  
 13

14 *ALA*, in any event, is less about the nuances of the concurring and  
 15 plurality opinions than the central idea that public libraries have broad discretion  
 16 to shape their collection and their reasonable decisions are not subject to  
 17 heightened scrutiny. As the *Bradburn* court observed, "the crux of the issue is  
 18 NCRL's discretion regarding what will be added to its collection." *Bradburn*,  
 19

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20 <sup>5</sup> Like the plurality, Justice Breyer observed pragmatically that although filtering software is imperfect,  
 21 "no one has presented any clearly superior or better fitting alternatives." 539 U.S. at 219.

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 24 DEFENDANT NCRL'S MEMORANDUM  
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1 168 Wn.2d at 810. As to that issue, there simply is no imperative that a public  
2 library provide adult patrons access to all constitutionally-protected content  
3 available on the internet. Under *ALA*, libraries may appropriately use internet  
4 filtering for collection development if mechanisms exist for patrons to obtain  
5 access to material inadvertently blocked. The *Bradburn* court applied this  
6 essential principle from *ALA* and this Court should do the same.  
7  
8

9 **III. Unpublished Authorities**  
10

11 Pursuant to LR 7.1(g)(3), NCRL attaches copies of *Ass'n. of Christian*  
12 *Schools v. Stearns*, 2010 Lexis 745 (9<sup>th</sup> Cir. 2010) and *Institute for Creation for*  
13 *Research v. Texas Higher Educ.*, 2010 Lexis 60699 (W.D. Tex. 2010).  
14

15 **IV. Conclusion**  
16

17 For these reasons, and for the reasons set forth in its earlier summary  
18 judgment submissions, NCRL asks this Court to enter summary judgment in its  
19 favor on Plaintiffs' claims under article I, section 5 of the Washington State  
20 Constitution and the First Amendment to the U.S. Constitution.  
21

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26 DEFENDANT NCRL'S MEMORANDUM  
27 REGARDING RESPONSE TO CERTIFIED  
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QUESTION - 9  
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1  
2 DATED this 2<sup>nd</sup> day of July, 2010  
3

4 KARR TUTTLE CAMPBELL  
5

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7

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DEFENDANT NCRL'S MEMORANDUM  
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QUESTION - 10

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## **CERTIFICATE OF SERVICE**

I hereby certify that on July 2, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the persons listed below:

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DEFENDANT NCRL'S MEMORANDUM  
REGARDING RESPONSE TO CERTIFIED  
QUESTION 11

**QUESTION - 11**  
CV-06-327-EFS  
#758984 v1 / 42703-001

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